Defending the Constitutional Order

"The Constitution Is Broken And Should Not Be Reclaimed." This headline from a New York Times editorial written by two law professors (from Harvard and Yale)[1], is simply a more hyperbolic expression of a point of view that has become increasingly prominent in the writings of law professors, journalists, political scientists, and politicians who deem the Constitution to be not only "broken," but also "paralyzing," "undemocratic," and "obsolete."[2] Even more prevalent are arguments for abolishing or radically changing key aspects of the document: the Electoral College, the Senate, the Amendment Process, the Presidential Veto, and the lifetime appointment of Supreme Court Justices.

The central argument of this paper is that the Constitution provides for a free government because it places effective limits on the exercise of power. This is an essential ingredient of any good government—even one that aims to be a popular government. That the people should rule is a given among republicans; that the people can do anything they want is a proposition that no sane person could believe. Thus, the limits that the Constitution places on American political life are not a problem, but a solution to a problem. That problem I define more precisely as the difficulty (even the danger) of popular government in a *massive modern state* The United States was the first nation to attempt this.

The way in which a people can live, including the way they can hope to be governed, is determined by several things: the natural and social environment; the country's size; the bellicosity of its neighbors. For example, do the people live in a verdant, crop-friendly

[1] Ryan D. Doerfler and Samuel Moyn, "The Constitution is Broken and Should not be Reclaimed," *New York Times*, August 19, 2022.

environment, or do they live in a desert?[3] It is impossible to imagine the way of life of the English people transposed to Arabia. Is the social environment congenial to widespread participation? Alexis de Tocqueville argued that the availability of land in North America, and the absence of a "landed aristocracy" whose political privileges were tied to their property holdings, made America a profoundly different place, socially as well as politically, from Europe—the first truly *democratic* society, the first nation where it could be said that an "equality of condition" prevailed among the citizens.[4] Another important variable is what the public thinks a "good" government looks like. How the citizens define "good" will set the parameters within which founders—constitution writers—must work. In revolutionary America, the only government that the public would accept as good was a popular government—one that rested on the broad consent of citizens, who would be given the responsibility of choosing their representatives at both the national, state, and local levels.

This understanding of a "good" government was almost unique in the 18th century—and there was no nation as large as the United States where it could be found. (Switzerland, for example, had the freest government in Europe in 1787, but it was only one-third the size of Virginia.) This American understanding was the product of many generations of *de facto* self-government, by a largely English-speaking people huddled on the coast of a largely unknown continent. They had a wealth of experience built up over these generations in such practical matters as how to elect a legislature, how to govern a town, how to choose and then place limits on their governors, how to tax themselves for their own good.[5] They were accustomed to

[3] On the impact of climate see Charles de Montesquieu, *Spirit of the Laws* (Cambridge UK: Cambridge University Press, 2002. 231-263.

[4] Alexis De Tocqueville, *Democracy in America*, Volume One, Introduction, pp. 3-18 (translated by Harvey C. Mansfield, Jr. and Delba Winthrop (Chicago: University of Chicago Press, 2000).

[5] Tocqueville stresses the novelty of the "free voting of taxes" by the citizens of New England towns. Ibid., p. 39.

living in freedom—and they were accustomed to the kind of equality that is possible when there are no lords or bishops in the neighborhood to tell them what to do, and no arbitrary restrictions on either movement from place to place, the ownership of land, or the selection of a profession or occupation.

When it came time to reconstruct the political order after the defeat of the British, the relevant models were therefore close to hand. That they did not work perfectly during the years of the Articles of Confederation—a time of interstate as well as intrastate conflict—required a second effort: the Constitutional Convention that met from mid-May to mid-September, 1787. That convention created a national government much different from the one under the Articles, and a new relationship between that government and the much older governments of the former colonies, now states. It this particular ordering of American political life that this book will attempt to explain and defend.

First, however, it is important to note the significant obstacles to stable popular government that are presented by any modern state—even its American version. It is important to notice also that *modernity itself*, as a way of thinking and being in the world, is the original source of these difficulties.[6] I contend that not only did the constitutional framework embody a measured and wise response to the problems of the time, it also remains the best framework for coping with the problems modernity poses for Americans today.[7] I treat the framers as men

[6] Powerful discussions of the political implications of modernity are to be found in Bertrand de Jouvenel, *Sovereignty: An Inquiry into the Political Good* (Carmel, Indiana: Liberty Fund, 1998), especially the chapter called "Prisoner of the Corollaries," and Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (Chicago: University of Chicago Press, 1992). For a comparison of the French and American Revolutions see Gertrude Himmelfarb, *The Roads to Enlightenment* (New York: Vintage, 2005), pp, 147-226. See also Karl Polanyi, *The Great Transformation* (New York: Farrar, 1944).

[7] For a brilliant discussion of the compatibility of social, technological, and economic modernization with America's "Tudor Polity" see Samuel P. Huntington, "Political Modernization: America vs. Europe," *World Politics*, Vol. 18, No. 3 (Apr., 1966), pp. 378-414.

who understood many of the problems that modernity brings with it, and who thought very carefully about how to deal with those problems—how to embrace modernity without *simply* embracing it, but in order to tame it.

The Birth of Modern Politics

To best appreciate the superiority of the American constitutional order it is first necessary to look at the profound transformations, both philosophical and practical, that lie at the heart of modernity, and then enumerate the politically relevant challenges that modernity presents to all governments. Modernity is above all a way of thinking about the relationship between the individual and the community, and it is difficult sometimes to appreciate the novelty of what, for so many generations, we have simply taken for granted as true: that human beings are created equal, that they have "natural rights" which governments are obliged to protect, and that the test of a good government is whether or not it makes possible the "pursuit of happiness" for the maximum number of citizens. These ideas were not taken seriously, or even contemplated by the mass of citizen/subjects anywhere in the world, until roughly the 17th century. Where did they come from?

Although he did not initiate every aspect of that theoretical transformation, the first writer to promulgate it systematically was Thomas Hobbes.[8] Hobbes did nothing less than revolutionize the understanding of human nature. In Hobbes' teaching, humans have no souls; they are simply the sum of their passions. He preaches a thorough-going materialism, in which all natural and human things are reduced to objects in motion. This required a cautious

[8] We do not mean to imply that Hobbes was the sole inventor of modern politics. We are aware of the influence of Francis Bacon, Niccolò Machiavelli and others in breaking with traditional ideas of science, politics, and religion. That is why, following Devin Stauffer, we stress that Hobbes was the first to *systematically* do so. Devin Stauffer, *Hobbes' Kingdom of Light* (Chicago: University of Chicago Press, 2018). The following discussion is heavily indebted to Stauffer's profound and insightful elaboration of Hobbes' system.

demotion of Christianity, as the moral foundation of the state, and a less cautious demotion of the churches ("the outworks of the enemy") as competitors for the loyalty of the kingdom's subjects. But it also required a critique of the ancient philosophers, most importantly Aristotle, who argued that humans are by nature "political animals", who have a propensity to engage with others to achieve common purposes not realizable on one's own. Humans, Aristotle taught, are not by nature solitary. They also have the power of speech about "good and evil…just and unjust," and they seek both to rule, and to be ruled, in ways that strike them as good.[9] By nature, they accept legitimate authority but also seek to influence how that authority is exercised. They are also inclined—at least some of them—to seek the highest goods the city has to offer, which tend to be *virtues* rather than *things*: e.g., prudence, greatness of soul (magnanimity), justice, and the honor which the possession of such virtues conveys. Citizens are not simply good or bad. Rather, they are varying amounts of each—although some are wiser, more courageous, or more magnanimous than others. Humans are passionate, acquisitive, cowardly, short-sighted, self-interested and willful, even as they are brave, reasonable, sociable, discerning, and virtuous. And the same individual might display any of these virtues, or any of these vices, at different times or under different circumstances.

Hobbes did not so much reject Aristotle and the other philosophers of antiquity as he sought to supplant them—to improve on their understanding of politics. Improving on the ancients, Hobbes insisted that the individual is not essentially social or political, but private and alone.[10] There is no innate human propensity to engage in political life. People only join a political community in order to obtain and safeguard the private ends that they cannot fulfill on their own. Unfortunately, left to their own devices, people will succumb to their passions,

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[9] Aristotle, *The Politics*, Book 1, Chapter 2, translated by Ernest Barker (Oxford: Oxford University Press, 1995).

[10] *Hobbes' Kingdom of Light*, Stauffer, op cit. 18, citing the Latin edition of *De Cive*, Howard Warrender, ed. (Oxford U.K.: Oxford University Press 1983, 1.2.

giving rise to conflict and war and the violent deaths that ensue. Therefore, humans must escape from their natural state in order to satisfy their passions for peace and security.[11] They must leave the "state of nature" and grant the power to suppress the conflicts which passions engender to a sovereign, who Hobbes calls *Leviathan*.[12] This is their "natural right", and it leads to the idea of establishing a form of rule capable of protecting the subjects' lives. Hobbes also praises the quest for "commodious living", by which he means the desire for the comforts made possible by a more vigorous commerce. Although that pursuit must remain subordinate to the quest for security, Hobbes perceives no moral constraint on the natural passion to indulge in the pleasures that only prosperity can bring ("such things as are necessary to commodious living").[13]

Hobbes conceives the world in exclusively material terms. The state can be ruled by reason because it is nothing other than matter in motion and therefore requires no resort to divine intervention. Any effort to explain things with reference to miracles and other forms of revelation Hobbes refers to as "superstition."[14]

The two most dangerous threats to the peaceful regime that Hobbes imagines are posed by religion and the quest for honor and glory: i.e., the churches and the aristocracy. Hobbes

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[11] As Stauffer persuasively argues, Hobbes does not demonstrate that the passion for peace and security is the paramount passion, surpassing such other passions as the desire for honor and glory or spiritual fulfillment; he merely asserts it. Ibid, 206.

[12] "The Leviathan" appears in the Books of Job and Isaiah, and also in the Psalms, as a fearsome creature of the sea, "the gliding serpent, ... the coiling serpent..." (Isaiah 27:1) Job 3:8 warns against "those who are ready to rouse Leviathan". Job also asks "Who can penetrate its double coat of armor? Who dares open the doors of its mouth, ringed about with fearsome teeth. Its back has rows of shields tightly sealed together." (Job 41: 12-15) It is not difficult to conclude that, for Hobbes, the most important quality of the modern state is that it can, when necessary, inspire fear among its many subjects.

[13] Thomas Hobbes, *Leviathan*, edited by Edwin Curley (Indianapolis: Hackett, 1994), 13.14, 14.8, 15.4. See also Stauffer, op. cit., 236.

[14] Ibid., 46.15.

was all too aware of the deadly impact of religious strife, given the terrible destruction that religious war had already brought to Europe and was now bringing to England. How could people refrain from slaughtering one another when their very souls and their path to the afterlife were at stake? Hobbes sought to redirect human attention away from such "superstitions" to *worldly* matters, especially the quest for peace and prosperity. He could not prove that revelation was a hoax, since the very idea of revelation lay outside his materialist/rationalist model of the universe. (And even *hinting* that it might be a hoax was dangerous.) Rather, by establishing a regime in which subjects would be secure and materially well off, subjects could be weaned away from a focus on the divine and enticed into concentrating on material concerns. In this way (and perhaps only in this way), the kingdom could be made peaceful—so long as the sovereign was powerful enough to keep the peace.

Honor and glory are natural passions and so they could not simply be eradicated. The English nobility had made their own contribution to the violent conflicts that had troubled the kingdom for generations. But suppression of these passions would require a weaning process, and arguments carefully crafted to appeal to the subjects' fears and desires. The quality of life in a regime dedicated to self-preservation would cause people, gradually, to focus on their material wants, and thus to become less interested in the dangerous passions of honor and glory and more concerned with the safety and comforts made possible by a regime of peace and prosperity. To that end, Hobbes' depiction of the state of nature—life without the Leviathan—was made as gruesome as possible, in order to sober up people who were prone to becoming intoxicated by the quest for power and the honors that accompanied it—by showing just how dreadful life would be in the absence of peace and security.

Power is crucial for Hobbes because it is the means for satisfying passions in the short term, and providing the wherewithal to satisfy them in the future. Power is also relative. If passions clash, one's ability to satisfy them rests on one's power relative to one's competitors. And, since desires and the competition to satisfy them are ongoing, one can never have too

much power. This will make subjects ever anxious, and anxiety about the future makes them ever more restless in the present. Happiness therefore requires continual striving. Gaining power is thus a natural human activity, even as the quest for honor and glory represent perversions of that necessary human attribute. This restlessness requires a government powerful enough to keep human striving out of the danger zones (religion, the love of glory), and confined to the zones of private pleasures and enchantments.

Because Hobbes appears to make the Leviathan all powerful, he could be misunderstood to be an advocate of totalitarianism. But this is not the case. First of all, Hobbes introduces the most basic of all liberal ideas, *consent.* People leave the state of nature voluntarily, willingly exchanging control over their own actions in order to achieve peace and security. In this sense the mass of people exerts a power they did not have under any previous regime.[15] For example, in the ancient city, even under a "democratic" constitution, only a very small percentage of the city's residents actually took part in its governing.[16] Second, although the means available to the Leviathan were in principle unconstrained, its ends were limited. It had no other goal than to provide peace and security. Such narrow ends place severe restraints on the sovereign because the sovereign had no right to do things that were not geared towards those ends. Thus, there is no justification for the all-encompassing government implied by the

[15] Part of this argument, of course, would have seemed puzzling to many English subjects, who were not aware that they had consented to anything. As we will see below, John Locke provided a solution to this puzzle.

[16] Athens had a population estimated at 400,000 in the 5th century BC, but only about 10 percent of the residents were citizens entitled to participate in the city's government. A. H. M Jones, *Athenian Democracy* (Baltimore: Johns Hopkins University Press, 1957), pp.76-77. See also John Rothchild, *Introduction to Athenian Democracy of the Fourth and Fifth Century BCE,* Wayne State University Law School Research Paper no. 07-32.

word "totalitarian" or even the highly ambitious, intrusive governments found in modern nation-states. Hobbes is thus the inventor of limited government.[17]

The Leviathan, ironically, turns out to be something of a sheep in wolf's clothing. It is not going to declare war on its great enemies—religion, honor, and glory—but rather, as discussed above, it will rely instead on weaning people away from such desires by substituting new ones: safety and prosperity. Coming as it did at the very end of the English civil wars (conventionally dated from 1642 to 1651), this argument could not have failed to make an impression, given that those wars had killed roughly 2 percent of the entire population of the kingdom.[18]

I have called Hobbes' teaching "transformative" because it established crucial differences between pre-modern and modern thinking. A strict materialism is now fundamental, not only to scientific thinking, but also to political thinking, as if politics had an affinity with physics. Ever since Hobbes, subjects and citizens are usually conceived not as political animals (as Aristotle taught) but as private individuals who view politics not as an essential part of their natures but rather as a means for obtaining the power necessary to satisfy their desires.

The doctrine of "natural rights" has also undergone a transformation. The most important fact about "human nature" is the fear of death and the desire to live a life of comfort and security. Politics is not a way to seek the rich variety of goods that a well-governed community makes possible, since the competition for such goods is likely to lead to the kinds

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[17] "Hobbes's new doctrine holds that the sovereign derives his authority from below ....Even if the sovereign is an absolute monarch...his authority is a human creation flowing from a democratic source." Stauffer, op. cit., p. 246.

[18] "It has been calculated that 100,000 soldiers and civilians died in the course of the conflict, and that a larger portion of the population perished than in the Great War of 1914-18. It has therefore justly been described as the bloodiest war in English history." Peter Ackroyd, *Civil War*: *The History of England, Volume III* (London: Pan Macmillan, 2014), p. 302.

of civil conflict that only the Leviathan can suppress. Accepting the Leviathan is the price to be paid for peace and quiet.

And, as Hobbes taught, there is no end to the satisfaction of desires, because satisfying a current desire simply leads to an urge to fulfill future desires. To pursue this quest requires a continued need for ever greater power, which means that life will be full of anxiety and stress. The modern market economy is premised on this principle of supply and demand, the former defined by resources and the latter by desires. In the Christian era, religion once sought to tame material desires, but the post-Reformation religious wars undoubtedly created a receptive audience for Hobbes's argument for subordinating church to state in the interest of peace. Religion would continue to exist, but it would no longer constitute a fundamental claim to the sovereign's right to rule. Indeed, a very large proportion of the citizens of the typical modern state do not worship, even if they do not fully define themselves as atheists.[19]

As Hobbes foresaw, the quest for honor and glory has not disappeared, but it is of no small significance that those seeking to satisfy such passions often pretend not to be doing so. Politicians claim to be merely servants of the people. Overt striving for glory is mostly confined to worlds outside of politics, e.g., in the worlds of sports and entertainment, and also of course in the military. Politicians, no matter how ambitious, are understood to be "public servants" rather than "rulers". Modern principles have not entirely displaced pre-modern concerns for courage, loyalty, duty, magnanimity, contemplation, and religious piety—but the modern principles have largely pushed the older notions to the periphery.

This fact deprives a modern regime of crucial advantages enjoyed by its pre-modern predecessors. Since modern citizens do not think of themselves as political animals, they have

[19] See, among others, Robert N. Bellah, *The Broken Covenant: American Civil Religion in a Time of Trial* (New York: Seabury Press, 1975. See also Jacob Wolf, *Harmonizing Heaven and Earth: Democratization and Individualism in American Religion,* Ph. D. Thesis, Boston College, Department of Political Science, 2020.

no natural inclination to form political communities and to undertake the duties and obligations that such communities engender. They are naturally individualist, private, and self-interested.[20] Without an established church, rulers can no longer bathe in the aura of the supernatural, claiming God as the source of their legitimacy. Since citizens are continually restless and dissatisfied as they discover an infinitely expanding set of desires, the ruler will never rule over a placid and contented populace. The people demand liberty and equality, but how is the ruler to provide both of these demands, which are naturally at war with one another?[21]

But if Hobbes hoped to guide both sovereign and subjects in ways that could establish a more peaceful kingdom, he failed. English politics in the generation following the publication of *Leviathan* (in 1651) was hardly peaceful. The monarchy was abolished by the forces responsible for the arrest and execution of Charles I in 1649, and during the next decade the United Kingdom was briefly a republic under the rule the Protector, Oliver Cromwell (and after Oliver's death, his son Richard). The monarchy was restored in 1660, ending Britain's first and only experiment in republican government.

But a generation after Hobbes, another effort was made to put politics on a new and more peaceful footing—even as English politics was about to enter another period of strife. John Locke's attempt to solve the political problem is found in *The First and Second Treatises of Government,* published in 1689—in the midst of the so-called Glorious Revolution, the political

[20] See especially Tocqueville, *Democracy in America*, op. cit., Volume II, Part One, 403-478.

[21] For an illuminating consideration of the problems of how the Constitution confronts the challenge of reconciling liberty and equality see Marvin Meyers, "Liberty, Equality and Constitutional Self-Government," in John Agresto, ed., *Liberty and Equality Under the Constitution* (Washington D.C.: American Historical Association, 1983). 1-24. See also Tocqueville, *Democracy in America*, op. cit., pp. 479-482.

events that are generally considered to have been the origin of the constitutionally constrained monarchy that begins the modern period of English political history.[22]

John Locke and Thomas Hobbes are both paired as "social contract" theorists, although this pairing at first encounter seems puzzling. Where Hobbes seems grim—without the establishment of a commonwealth, life is "nasty, brutish, and short"—Locke appears to be hopeful: the "commonwealth" is the result of a rational decision on the part of free individuals to engage in a social contract, in order to better their chances for a peaceful and prosperous life. Hobbes argues that the people create the sovereign in order to avoid anarchy and civil war, because, as he argued, the greatest fear is the "fear of violent death."[23] Subjects really have no choice but to allow the sovereign whatever powers it needs in order to achieve a lasting civil peace—because this is the reason they created the sovereign in the first place.[24] The message of *The First and Second Treatises* is that individuals, in the natural state, lived without the need for government, until the development of commerce made their lives both more comfortable, but also more complicated.[25] This makes Locke's argument seem more benign than Hobbes's argument, but this difference should not mislead us. *In both versions, the*

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[22] John Locke, *Two Treatises of Government*, ed. Thomas I. Cook (New York: Hafner Publishing Co., 1947). Locke wrote his two treatises in the mid-1680s, before being forced into exile in Holland. The works were published anonymously, and Locke never acknowledged his authorship during his lifetime.

[23] When men live without a civil state to protect them, they live in "continual fear and danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short." *Leviathan*, op. cit., 13.9.

[24] "It" is the appropriate pronoun here, since (as the illustration used as the frontispiece of *Leviathan* demonstrates) the "king" is really a human figure who is entirely composed of the separate bodies of the subjects. On the ambiguous meaning of this illustration, see Stauffer, op. cit., pp. 272-274.

[25] Those contemporaries who criticized Locke's writings often did so because of the resemblance they bore to Hobbes. On this point, see Thomas L. Pangle, *The Spirit of Modern Republicanism* (Chicago: University of Chicago Press, 1988), n. 8, pp. 303-304, and n. 11, pp. 305-306. Locke at first makes this transition seem little more than a sensible adjustment, but he concedes as the argument progresses that men would have been "quickly driven into society."

political association did not exist until people created it for their own private reasons. The difference is that in Locke's telling of this tale, it is not simply, or even primarily, the fear of violent death that pushes men into the commonwealth; rather it is the desire for comforts, prosperity, and the liberty to acquire and manage property.

But first Locke poses this question, in *The Second Treatise:* Since God gave the world to all mankind in common, how is it (some people wonder) that some have use of certain pieces of property which others are not allowed to use?[26] That is, where does *private* property come from? And what is one to make of the obvious inequality of possessions found everywhere?

Locke argued that humans were not, in their "natural state", political beings whose natures impelled them to owe allegiance or form political communities. This is sp because reason tells us it is so, but scripture agrees. The Bible tells us, after all, that God created male and female, and gave them dominion over the animals and plants that God has provided for their use. Humans lived in this natural state, without laws to bind them, other than the "natural law," which gives to each individual the right to control what is his own: i.e., his labor, and what his labor produces. "To understand political power right, and derive it from its original, one must consider, what state a men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man."[27] In the beginning, this rule put a simple limit on private property—whatever could be taken from the common stock for private use, provided that "there was enough and as good left over for others." What we mix our labor with—by catching the rabbit, or growing the grain—is rightfully ours.

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[26] Locke, *Second Treatise*, V:25.

[27] Ibid, II:4.

One could expect very little difficulty in this natural state, since there was an abundance of food and a scarcity of people.[28] Admittedly, there might be some individuals who would seek to "engross" more than their fair share, but most of what they gathered would spoil before they could consume it. Reason—in this case, the desire not to waste time gathering food that would only spoil—would solve this problem automatically. Some might turn violent, of course, but we could easily kill anyone who threated our life.[29]

The change in this simple arrangement came with the discovery of a substance that had no intrinsic use, but which did not spoil, and therefore could "stand for" a haunch of deer or a bushel of apples: i.e., gold ("some useless piece of metal").[30] Discovering how this otherwise useless metal could be used to "stand for" actual commodities is the beginning of a process of invention and discovery which will have important consequences:

1) Now it *will* be possible to "hoard" more than can be immediately used, since the gold, which can be exchanged for actual produce, will never spoil. More importantly, money makes a *market* possible. Instead of lugging deer legs hither and yon to trade for potatoes, we could stroll over to the market with coins in our pocket and trade them for the things we need but have not labored over ourselves.

2) Inequality of possessions now becomes inevitable, as some men will be better at subduing the land and producing a surplus.

3) The surplus will actually be a blessing, however, rather than a source of conflict, since more food will make it possible for the population to grow; and

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[28] "Thus in the beginning all the world was America, and more so than that is now...." Ibid.

[29] "...the execution of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation ...." (Ibid., II:7)

[30] Ibid., V:46.

4) Protecting what is ours becomes more difficult, because what we own might be spread over a great expanse of territory, and conflicts over who has the right to which piece of land will become more frequent and more dangerous.

So, men being reasonable (most of them anyway), we discover the need for rules, and therefore for some way of enforcing those rules, and judging legitimate disputes between those who have reasonable claims to the same bits of what "God has given to all mankind in common."

To the obvious question—When was the world really like this?—Locke has a simple answer. "Government is antecedent to written records."[31] We cannot know that this is how the modern world really began, but what we can agree on is that the conflict over property, whenever it first occurred, would have suggested a rational solution. Men would have agreed to form a civil association (a "commonwealth") in order to supply what the natural state lacked: a body to make laws; an executive to enforce the laws; and judges to resolve disputes.

What is missing from this simple story? Everything an English reader would have expected from a "treatise on government". There is no mention of a king, or a parliament, or an established religion[32]--and there could not have been many books published in Locke's lifetime that did not mention these familiar institutions. Locke has simply changed the entire story: nothing in *The Second Treatise* brings up any of the questions and conflicts that had determined the day-to-day lives of Englishmen for the past century. Even more successfully than Hobbes, perhaps, Locke profoundly changed the way in which English readers (and many others) thought, not only about governing, but about the political association itself: where it came from, why it is essential, how it should be governed.

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[31] Ibid., VIII:101.

[32] Although the *Second Treatise* begins with an observation about "reason" and "scripture" agreeing, reason remains, but scripture drops out of the discussion pretty quickly.

Most importantly, Locke explains that "free and equal" individuals would only have agreed to leave the natural state and "put on the bonds of society" in order to better secure the rights they had by nature, but which they could no longer secure properly in the absence of government. Locke defined these rights as "life, liberty, and estate."[33] Only a government that could reliably protect these rights could have a legitimate claim on the citizens' loyalty. This argument, of course, explicitly rejects the traditional English understanding of loyalty, which is that loyalty is owed by those below to those above: to knights, kings, and bishops. But the knights, kings, and bishops have been swept from the table; what remains is the individual member of society (the pawn?), who will owe no allegiance to anyone or anything to which he has not given his consent, either directly (at the moment the commonwealth is created) or indirectly—by accepting the benefits of a peaceful civil commonwealth, without which he would be back in the state of nature, chasing deer and picking acorns, like his long-ago and long-forgotten (and perhaps imaginary) ancestors.

The Age of Natural Rights

The philosophers of the 18th century made important additions to the "natural rights" doctrines so important to the English, both at home and in their North American colonies. This period has come to be known as "The Age of Enlightenment." Its central element, as promulgated by its most important progenitors, amongst whom were the French Philosophes, was *reason*. Truth and human improvement depended on the human mind to logically and analytically think through the conditions of existence without resort to pre-existing prejudices. This idea is already present in Hobbes, but he saw the decline of unreason as a weaning

[33] In this context, the word "estate" refers to tangible property. Thus, the phrase "life, liberty, and estate" includes everything the Commonwealth is created to protect. Locke's understanding of "natural rights" appears in the Declaration of Independence, which also borrows "the pursuit of happiness" from Locke's *Essay Concerning Human Understanding*, Volume One, Book II, Chapter XX1, pp. 219-220 (New York: Everyman's Library, 1961).

process. In particular, subjects would be "weaned" of their various religious enthusiasms by an appreciation of what the commonwealth is designed to provide. Locke referred to this great benefit as "peace, quiet, and property."[34] French followers of the philosophes had a significantly different goal in mind: "liberty, equality, fraternity," all of which would need to be imposed on political life immediately, even if that meant bloody suppression of the "unreasonables."

The fundamentality of reason implied universality. As Gertrude Himmelfarb explains, "the function of reason was to produce universal principles independent of historical circumstance and national spirit."[35] Thus, through the rigorous application of reason, social, economic, and political truths could be ascertained, that would enable all peoples to first fully understand their true natures (and their "true natures," of course, would all be identical) and then live and govern themselves in accord with those universal principles.

Reason also implied a commitment to science, understood as "empiricism". To be accepted as valid, propositions had to be subject to empirical verification. If they could not be proved false after being subjected to the most rigorous testing, then and only then could they be considered to be true. This commitment to science had two major effects. It greatly accelerated technological change, which increasingly involved the application of scientific principles as opposed to mere trial and error. And, most profoundly, it undermined religion, since faith was, by definition, not subject to empirical verification.

The *political* manifestation of modernity, the modern nation state, is not simply the product of individualism, natural rights, or the Enlightenment. Nor is it entirely modern. In fact, the particularism implied by the nation—by "nationalism"—is to some degree at odds with the modern principle of universality, yet it has shown remarkable strength—witness Brexit and

[34] Locke, *Second Treatise*, XI:36.

[35] Himmelfarb, *The Roads to Enlightenment,* op. cit., p. 161.

the Ukrainian resistance to a Russian takeover. And, quite obviously, abstract reason does not dominate political decision making, despite the dreams of the philosophes. Yet one should not underestimate the importance of reason, materialism, individualism, science, technology, and the selective impact of universality as embodied in the concept of natural rights, to the modern project. As stated above, most modern governments are secular, with no official link between ruling and religious faith.[36] They claim to rely on the consent of the governed. Modern states acknowledge (or pretend to), and try to secure, the universal principles of human and civil rights. They claim to base themselves on reasoned political ideas and gain legitimacy from doing so. Their geographic, economic and demographic contours would be impossible if not for the revolutions in transportation, manufacture, food production, and communications that the practical application of science and the unleashing of human appetites has brought about. And, at least for the many millions, including many who profess religion, the power of secularism and modern science brings with it a preoccupation with things of this world.

The Framers were deeply influenced by Hobbes and the great liberal philosophers who came after him, especially Locke, Montesquieu and Hume. *The Federalist* more frequently quotes Hume and Montesquieu, but the incorporation of seminal ideas such as natural rights, consent, the primacy of security for life, liberty, and estate display their great debt to John Locke as well. The Framers prided themselves on being enlightened and on freeing America from the shackles of feudalism and of founding "a new political science."

Modern Politics

[36] Ceremonial, or symbolic, links between the state and the church continue to exist in some modern states. The British monarch, for example, has the official title of "Defender of the Faith and Supreme Governor of the Church of England." https://www.royal.uk/queens-relationship-churches-england-and-scotland-and-other-faiths. The only genuine theocracies are now in the Muslim world, and even there they are much rarer than they once were.

Regardless of their specific roots, and because they have multiple roots, the following are the most politically relevant attributes of modernity. In a modern state no person can, without fear of ridicule, claim to be better than another as a matter of birth. Equality is the rule. In the public sphere, rank does *not* have its privileges. Claims of superiority are only considered valid if they are based on a rational principle, merit. Of course, equality and merit are often honored in the breach. But such hypocrisy does not undermine the compelling nature of such claims.

The modern state is enormous in scale. It is true that there are also some small states, but those exist at the sufferance of the large ones that could easily conquer them if they chose to. The US is not Switzerland—but then neither is France, England, Russia, Japan or any of the important modern states that have smaller populations than the United States. Before the modern period, large political entities were empires rather than nations, and they lacked the level of political integration, stable borders, and administrative control that modern states enjoy.[37] Self-government is not possible in an empire.

Scale means not just acreage, but people—and large populations are more important than large territories, as Locke pointed out.[38] It is inevitable that the vast populations of modern states will bring diversity with them. Modern states therefore typically encompass many different ethnic, cultural, racial, and religious groups. Sometimes these diverse elements are separated into different regions and locales, but often they are intermingled—and not always harmoniously. Nations as different from one another as Canada, Nigeria, the United States, and India have experienced conflict, sometimes violent, between groups of citizens whose differences of ethnicity, religion, or language were stronger than their commitment to a

[37] The only great 20th century exception to this rule appears to be Russia, but that only goes to show that the USSR was really an empire and not, as it claimed, a union.

[38] Locke, *Second Treatise*, V:42.

common national home. Among the large modern states only Japan is ethnically, culturally, and racially homogeneous.

When polities were small, as they were in the ancient republics and in the American colonies, direct rule by the people was at least possible. All the citizens of Athens or of a New England town could gather in one place and deliberate among themselves as to how to address issues of common concern. Because their number was small, citizens had the chance to speak and be heard. Yet because the modern state numbers in the tens or hundreds of millions, direct participation is impossible except for a small fraction, counting both office-holders and an activist fringe. Each citizen comes to compose an infinitesimal fraction of the whole. Not only does this place practical limits on direct participation but it also makes it very difficult to resist the conclusion that any one individual is simply too insignificant to matter politically and, therefore, one may readily become passive. Because all modern states claim to rule in the name of the people, those who belong to it are called *citizens* not *subjects*, as they would be called in a monarchy. And yet, arithmetic reality threatens to turn them into subjects, in fact if not in name. Thus, the claim of "popular sovereignty" does not, per se, protect against autocratic rule.

In modern states populations are not only large and diverse, they are highly mobile. Indeed, states like Brazil, India, Pakistan, and Nigeria, that lack many attributes of modernity but have experienced vast improvements in transportation and public health, have also experienced high rates of movement from rural areas to major cities. And these and other poor countries have also contributed to high rates of *global* mobility by migrating in large numbers to the more fully modern states of Western Europe, Britain, Canada, and the United States. As a result of both international and internal migration whole new communities and neighborhoods have arisen and their inhabitants have not yet put down strong roots and continue to live among strangers. The long human era when most people lived and died not very far from where they and their ancestors were born is now coming to an end.

To ensure peace and security, modern states must command and mobilize huge militaries—the 20th Century became the most violent and destructive in human history as a result. But even if a state is peace loving, it still must protect itself from other states that may not share its peaceful outlook, as Britain and France discovered, to their sorrow, in the 1940s. To do so, it must match the military might of the most aggressive and powerful state that might threaten it. Lacking enormous military muscle, it will either be conquered or rendered subservient by a foreign power.[39] And unlike pre-modern armies, which were helter-skelter affairs, mobilized in haste and demobilized in peacetime, modern armed forces are professionals who remain permanently mobilized. Not only does this strain organizational capacity, but it imposes an enormous recurrent tax burden on the citizenry. Modern states require a level of routine coercive capacity unknown and unavailable to their pre-modern counterparts.

The government that is strong enough to protect the people is strong enough to tyrannize them as well. Modern history is replete with examples of leaders using their armies and national police forces to terrorize the population or punish their opponents, and of generals ordering their troops to turn their guns on elected governments and to replace those governments with a military dictatorship. Napoleon and Mao were generals before becoming tyrants. Hitler and Stalin established powerful armies and apparatuses of civilian control capable of creating vast empires, repressing dissent, and indulging in the mass murder of millions of their own people as well as millions of those they conquered. What this sad history reveals is that, in addition to the other challenges posed by modernity, modern states can be *dangerous*.

[39] Since WWII, Western European states have not had to face this reality because the United States has placed them under its nuclear umbrella. This is a rare exception to the rule that a state must be as strong as its most dangerous rival.

The quest for material well-being and longer lives ensured that the fruits of modern science and technology would be aimed at providing prosperity, longevity, and physical wellbeing, as well as military capability. As a result, the vast majority of people in a modern state will be wealthier than human beings have ever been, except for the tiniest minority. And in some places even middle-class citizens will enjoy a material abundance unknown even to the pre-modern aristocracy. Unfortunately, as Hobbes foresaw, well-being does not breed contentment. As citizens' more immediate wants are satisfied, new desires emerge that they seek to fulfill. As productive capacity increases, citizens become less content with their current levels of consumption. When Samuel Gompers, the first president of the American Federation of Labor, was asked what the American worker wanted, he had a simple answer: "more."[40] He was right: modern citizens do not want merely "enough"; they expect the pie to grow larger forever, and for their own shares to grow as well. Thus the more government accomplishes in providing for people's wants the more the people pressure it to do even better. The ever-expanding demand to provide for human welfare complements the need for security to make government ever more powerful and intrusive. And, as advances are made in nutrition, sanitation, and medical science, people in modern states live much longer and infant and child mortality decline. Populations will therefore grow, contributing to the problems caused by size.

France

To better appreciate the Framers achievement in both acknowledging and constraining the political impact of modernity, it is useful to compare it to the fruits of the other great 18th Century Revolution, the French, which reached its apotheosis during the Reign of Terror. The French revolutionaries fully embraced modernity, especially reason and its derivative,

[40] https://www.brainyquote.com/quotes/samuel_gompers_205273.

universality. Reason was both the acid disintegrating the existing barriers to human flourishing—custom, habit, feudalism, religion—and the fundament upon which future flourishing would rest. The rule of reason took many forms. All formal claims to superiority were abolished. There would be no more nobility—nobles lost not only their titles and property, but often their lives as well. Persons would no longer address each other as "sir" or "madam" but simply as "citizen".[41] Because the existing division of the country into provinces embodied noble claims and ancient customs, the old map of France was thrown away. The new map eliminated the provinces and instead carved up the country into *departments* whose borders purposefully ignored existing provincial divisions, and claimed to be based instead on rational geographic principles. The departments had no independent claims to governing authority; their authority derived entirely from their status as administrative units of the central government in Paris.

Time and dates were likewise detached from their irrational designations. Clocks were redesigned to designate hundred-minute hours and ten-hour days. The calendar was decimalized. Weeks were divided into ten days whose names were replaced by numbers. Although there would still be 12 months, each month would now consist of three ten-day weeks, whose traditional names would be replaced by names from nature—for example, Frimaire ("frost"), and Thermidor ("heat"). Historical time was no longer separated into before and after Christ's birth. Instead, history was dated from the first year of the Revolution, and new holidays were created to replace the old. There would be no more "irrational" units of weights and measures. These would now be decimalized—100 centimeters to the meter, 1000 grams to the kilogram, etc.

The tragedy, and, sadly, the recurring impact, of the Revolution was that it could not rest content with salutary and/or modest efforts to govern according to reason. It sought

[41] Thus, revolutionary France's ambassador to the United States—born Edmond-Charles Genêt—became simply "Citizen Genêt".

nothing less than the full-fledged imposition of life according to fixed, rational principles. This required the fundamental reorientation of the human psyche. Himmelfarb quotes Robespierre as taking on the task of "changing human nature ... transforming each individual ... bringing about a complete regeneration... and ... of creating a new people." The Revolution sought to "change human nature."[42]

Because most people were so steeped in habit, custom, religion, and conventional understandings of how to think and behave, the necessary transformation could not be achieved incrementally, or even peacefully. It required nothing less than a Reign of Terror. Historical estimates vary, but even those at the lower end place the official executions at 17,000. Deaths resulting from the mob violence the Revolution provoked, and those who died in prison, elevate that number to 40,000 or more. This amounted to the death of at least one out of every 700 residents of France.[43] Regardless of what they were accused of, these victims and the many more who had their property confiscated and/or who were incarcerated, had no benefit of habeas corpus or trial by a jury of their peers. The guillotine was the chosen method of official execution because of the speed and efficiency with which it could be deployed. For the duration of the Terror the Catholic Church was effectively put out of business, priests were subject to abuse, and church lands were confiscated. Although lip service was paid to liberty, the Terror rendered liberty null and void.

Since they were crafting a constitution for what was clearly a modern state, the American framers gave great credence to reason, science, and universality. They abolished all

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[42] Himmelfarb, *The Roads to Enlightenment,* op. cit., p. 185.

[43] Statistica.com https://www.statista.com/statistics/1009279/total-population-france-1700-2020/. (Donald Greer, *Incidence of Terror* (Cambridge: Harvard University Press, 1966 [1935]), Ch. 3, pp, 38-70.

feudal remnants[44] and, as Lincoln stressed, they considered the "self-evident" rights enunciated in the Declaration of Independence as the unstated premise upon which the Constitution itself was based. Their path diverged from the French because they did not aspire to *transform* human beings or human nature itself. They accepted human nature as it was, because they understood that human nature cannot be changed. However, they diverged from Hobbes by not claiming that human nature consisted of nothing but the interplay of passions. They sought to devise a form of government that both relied on a pre-modern understanding of human virtue and sought to compensate for, rather than extirpate, human failings. In *Federalist* 51, for example, Publius recognizes that "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[45] But men were not angels and could not be made to be so. They were passionate, self-interested, and prone to forming factions. They desired power. But they were also virtuous, thoughtful, and public spirited—but not reliably so. To succeed, government would have to adapt to this ambivalent reality. The Framers built upon human virtues and sought to check human foibles. They allowed pre-modern qualities of human life to coexist with modern ones. Humans could aspire to knowledge and progress even as they clung to religion, custom, and other "non-rational" beliefs and practices.

[44] There were not many such feudal remnants, but two were of special importance: *primogeniture* (a rule *requiring* that property descend entirely to the oldest son), and *entail* (a rule requiring that property inherited by a married daughter return to *her* family after her death, rather than to her husband or her husband's family). These laws did not prevail everywhere in the colonies, but their disappearance meant an even wider distribution of property, including land, than before. On the significance of property and inheritance laws, see Tocqueville, *Democracy in America*, op. cit., pp. 46-53.

[45] *The Federalist*, op cit., pp. 330-335.